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National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

S.A.M. DATE: January 13, 2016

TO: M. Kathleen McKinney, Regional Director
Region 15

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Durham School Services, L.P.
Case 15-CA-163098

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This case was submitted for advice as to whether the Employer violated the Act by seeking through discovery in a state court lawsuit the identities of employees who completed union safety surveys. We conclude that the Employer's actions violated Section 8(a)(1) because employees' Section 7 confidentiality interests outweigh the Employer's need for the information.

FACTS

Durham School Services, L.P. ("Employer") provides school bus transportation services for the Santa Rosa County school district in Florida. In February 2013, Local 991 ("Union" or "Local") of the International Brotherhood of Teamsters ("International") won an election to represent school bus drivers and monitors in that county, and the Board certified the results the following year. The Employer has since refused to bargain with the Union in order to challenge the union's certification, and appellate court review of the ensuing Board decision finding a Section 8(a)(5) violation is currently pending. In a related Section 8(a)(1) case, an ALJ has concluded that the Employer unlawfully interrogated an employee leading up to the election, and engaged in a host of unlawful conduct post-election, including creating the impression of surveillance, telling employees that union representation would be

futile, promulgating a new rule in response to union activity, and repeatedly interrogating employees.[1]

In early 2013, a panel of domestic and international labor and human rights activists began investigating the Employer's working conditions in North America. After learning that drivers in Santa Rosa County experienced safety and health hazards, the panel requested that the International arrange a site visit to observe these hazards.[2] On April 18, 2013, representatives from the Local and International, together with members of the panel, visited a bus yard in Navarre, Florida. Without seeking permission from the Employer, the group entered the Navarre bus yard through an open gate, spoke to employees about their hazardous working conditions, and at least one member of the group boarded a school bus to inspect it for health and safety problems and to take photographs and videos. When an Employer representative confronted the group and asked them to leave, the group complied. Just after they exited the bus yard, police arrived and informed them that entering the bus yard without permission constitutes trespassing on school property. Later that day, representatives from the International together with members of the panel went to the school district's transportation office in order to obtain permission to enter the Employer's bus yards to continue their investigation of working conditions. The transportation office is directly adjacent to another school bus yard used by the Employer in Milton, Florida. An Employer representative again asked the group to leave the premises, although the Union claims that the visitors were on public property and did not, in fact, enter the Milton bus yard.

That evening, the International and Local held a public forum for the purpose of educating the community about the Employer's work and safety conditions. The forum was moderated by the panel of domestic and international activists described above. A packet distributed at the forum included fourteen affidavits from Santa Rosa County drivers complaining about their working conditions. Almost all of these affidavits contain at least one complaint about the safety of the Employer's buses, including problems with tires, brakes, delayed repairs, and mold, and the affidavits were signed in the weeks leading up to the site visits.

Also included in the forum packet were data summarizing the results of safety surveys distributed by the Union and completed by Santa Rosa County employees during the organizing campaign. The survey instrument itself states that it is confidential. The instrument asks that the survey responder list his or her name and

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[1] *See Durham School Services, L.P.*, Case No. 15-CA-106217 et al., JD–62–15, Oct. 30, 2015.

[2] *See* Brief in Support of IBT, Local 991's Appeal of the Dismissal of Unfair Labor Practice Charge 15-CA-105976.

contact information if interested in becoming involved in the International's campaign to improve safety standards on school buses.

About a month after the site visits and community forum, the Employer filed a civil lawsuit against the Local, International, and individual representatives from those organizations alleging trespass and seeking an injunction against repeated and willful trespass, among other claims. In their answers, the Local and International argued that the state court's jurisdiction was preempted under *Garmon*[3] because the defendants' actions were arguably protected by Section 7 as protected concerted activity to investigate health, safety and workplace concerns, and to otherwise seek to improve working conditions. Their answers additionally stated that the claims and relief sought were preempted by the Act and that the defendants' activities were protected activities under the Act. Notwithstanding the defendants' *Garmon* preemption defense, no charge was filed with the Board alleging that the group's expulsion from the Navarre bus yard was unlawful. The Local did file a charge alleging that the Employer's trespass lawsuit was unlawful, but the Region dismissed that charge and the Office of Appeals affirmed the dismissal. In pursuing that charge, the Local did not advance the theory that the lawsuit was preempted by the Act; it merely argued that it was coercive of employees' Section 7 rights.

During the course of discovery in the state court trespass action, the Employer requested the records from which the safety data contained in the community forum packet were compiled. The International produced copies of the surveys with employee names and contact information redacted. On July 30, 2015, the Employer filed a motion to compel, alleging that the International unnecessarily redacted information in its various document productions. During a phone conference concerning the motion on August 7, 2015, the Employer's counsel requested unredacted versions of the safety surveys for the first time. Out of concern for the confidentiality interests of the employees, counsel for the International and Local proposed limiting disclosure to Employer's counsel of record in the trespass action, who was outside counsel. The Employer rejected this proposal and asserted that it was entitled to the information because it was material to the defense that the trespassers were investigating health and safety concerns and it needed the identities to ascertain the bona fides of the surveys, the manner of their creation (i.e. whether solicited or unsolicited), and the particulars of the safety issues raised.

During a November 30, 2015 hearing on the motion to compel, counsel for the International and Local argued that the discovery request violated the Act because employees have an interest in keeping their union activities confidential. The judge ruled that the unredacted surveys should be produced pursuant to a protective order that would limit disclosure to the Employer's trespass counsel, who would be

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[3] *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

permitted to consult with and share the information with a corporate representative and another outside counsel (i.e. labor counsel) as needed to prepare to interview or depose employees. The parties have recently submitted a proposed protective order to the judge, and it is awaiting his signature. The unredacted surveys have not yet been produced.

ACTION

We conclude that the Employer's pursuit of the unredacted employee safety surveys violates Section 8(a)(1) because the employees' Section 7 confidentiality interests outweigh the Employer's need for the discovery.

The Act protects the right of employees to keep their union activities confidential from their employer in order to prevent the chilling of such activities and to protect employees from the possibility of intimidation by their employers.[4] Employees' confidentiality interests extend not only to union membership, union authorization cards, and attendance at union meetings,[5] but also employees' communications with a union, including their complaints concerning terms and conditions of employment.[6] Accordingly, employer efforts to learn the identities of

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[4] *See Guess?, Inc.*, 339 NLRB 432, 434, 435 n.8 (2003) ("This right to confidentiality is a substantial one, because the willingness of employees to attend union meetings would be severely compromised if an employer could, with relative ease, obtain the identities of those employees."); *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995) ("[I]t is entirely plausible that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed. . . . [The Board] take[s] very seriously the possibility of intimidation of employees by employers seeking to learn the identity of employees engaged in organizing.") (internal quotations and citations omitted).

[5] *See Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 3 (Aug. 19, 2011) (union membership); *Guess*, 339 NLRB at 434 (attendance at union meetings); *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999) (authorization cards), *enforced*, 200 F.3d 1162 (8th Cir. 2000); *National Telephone*, 319 NLRB at 421 (authorization cards and attendance at union meetings).

[6] *See Allied Mechanical*, 349 NLRB 1077, 1077 n.1 (2007) (deposition questioning concerning union meeting discussions of complaints about working conditions and reasons for unionization unlawful); *Chino Valley Medical Center*, 362 NLRB No. 32, slip op. at 1 n.1 (Mar. 19, 2015) (employer violated Section 8(a)(1) by issuing subpoenas to employees encompassing employee-union communications, union authorization and membership cards, and documents related to the distribution of those cards).

employees engaged in such activities and the nature of their activities violates Section 8(a)(1).[7]

In *Guess*, the Board announced a framework for assessing the lawfulness of an employer's demand for information concerning employees' confidential Section 7 activities in the course of a legal proceeding.[8] Specifically, it held that, in order to be lawful: (1) an employer's request must be relevant, (2) an employer's request must not have an "illegal objective," and (3) the employer's need for the information must outweigh the employees' Section 7 confidentiality interests.[9]

As an initial matter, we conclude that the *Guess* balancing test is a legally valid analytical framework, and we disavow earlier concerns raised as to whether such balancing has a role to play in reasonably-based lawsuits.[10] In *Guess*, the Board explained that discovery is preempted by the Act where the "importance of the [Section] 7 rights that would be compromised by a discovery request outweighs the interests that would be served by the discovery request."[11] As such, the Board has the authority to condemn discovery requests that do not satisfy the *Guess* balancing test, even in the context of a reasonably-based lawsuit, because such preempted requests do not implicate First Amendment concerns.[12]

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[7] *See National Telephone*, 319 NLRB at 421.

[8] 339 NLRB at 433-34. Although *Guess* involved the lawfulness of questioning in a deposition, we construe its test as encompassing document requests in discovery as well, since the Board in *Guess* relied on *National Telephone*, 319 NLRB at 420-22, and *Wright Electric*, 327 NLRB at 1195, in devising its standard, both of which involved employer requests for documents.

[9] 339 NLRB at 434.

[10] *See Stock Roofing Co.,* Case No. 18-CA-19622 et al., Advice Memorandum dated May 26, 2011, at 5 n.4; *Chinese Daily News, Inc.*, Case No. 21-CA-36919 et al., Advice Memorandum dated December 29, 2006, at 2 n.6; *Cintas Corp.*, Case No. 29-CA-27153, Advice Memorandum dated May 24, 2006, at 5 n.14; *American Broadcasting Companies*, Case No. 31-CA-27698, Advice Memorandum dated May 24, 2006, at 5 n.10.

[11] 339 NLRB at 435 n.10 (citing *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983)).

[12] We additionally note that *Guess* issued after the Supreme Court's decision in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), and that the Board has continued to apply *Guess*'s balancing test following its 2007 reconsideration of *BE & K* on remand. *See Best Century Buffet, Inc.*, 358 NLRB No. 23, slip op. at 1 n.1 (Mar. 27,

Applying these principles, we conclude that the Employer acted unlawfully by insisting that the Union produce employees' unredacted safety surveys during the course of discovery, thereby revealing the identities of employees who complained to the Union and wished to become involved in the International's bus safety campaign. We find that the Employer's request did not have an illegal objective and that it is relevant to the state court action because the Union thrust the issue of employee safety complaints into the case by raising its preemption defenses.[13] Nonetheless, the Employer's request violated Section 8(a)(1) because the *Guess* balancing favors the employees' Section 7 confidentiality interests.

2012) (*Noel Canning* Board); *Chinese Daily News*, 353 NLRB 613, 614-15 (2008) (two-member Board).

[13] The Union's *Garmon* preemption defense is without merit. It never filed a charge challenging the Employer's exclusion of the group from the Navarre bus yard. Nor did the Union argue that the trespass action was preempted under *Garmon* when it presented its charge challenging the lawsuit itself. Since the Union failed to invoke the jurisdiction of the Board to decide whether it was engaged in protected activity when it entered the bus yard purportedly to investigate safety complaints, and the Employer had no means of presenting that issue to the Board, the state court can adjudicate the matter. *See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 201-03, 206-07 (1978) (holding that the Act does not deprive a state court of jurisdiction over action involving arguably protected trespassory picketing where the union failed to invoke the jurisdiction of the Board and the employer had no means to do so). Similarly, the Union's argument that the trespass was actually protected by the Act is of dubious merit since it does not appear that the employees' Section 9(a) representative, i.e. the Local, sought access in order to fulfill its duty of responsible representation. The site visit was organized at the prompting of the panel of domestic and international activists in order to further the panel's nationwide investigation of the company. Thus, it appears that the Local representative was present to facilitate the tour and was not, in fact, there for the purpose of verifying particular employee complaints. Furthermore, the Local did not make any effort to seek the Employer's permission or schedule the visit so as to minimize any interruption of operations. *See Holyoke Water Power Co.*, 273 NLRB 1369, 1369-70 (1985) (employer must afford the union hygienist access to its facility, upon request, to conduct noise level studies because employees' right to responsible representation outweighed employer's property interest; access must be limited to reasonable periods to avoid unwarranted interruption of operations), *enforced*, 778 F.2d 49 (1st Cir. 1985); *Hercules, Inc.*, 281 NLRB 961, 966, 971 (1986) (employer unlawfully denied union's trained expert access to its facility to investigate an industrial accident and conduct health and safety testing; local requested access in good faith for the benefit of the bargaining unit and it was not acting as a surrogate

Here, the employees' interest in maintaining the confidentiality of their safety surveys is strong. The surveys not only constitute employee communications to the Union about their working conditions, to which employees have an obvious confidentiality interest,[14] they also reveal which employees wanted to become active in the International's campaign to improve bus safety. Recognizing that employees might be hesitant to register their safety concerns if the Employer would be privy to their complaints, the survey instrument itself promised employees that their responses would remain confidential. Moreover, employees completed the surveys during the organizing campaign, when employees have a heightened interest in keeping their union activities secret from their Employer.[15] And employees would reasonably fear intimidation if their identities were shared with the Employer at this point, since the Employer committed a number of unfair labor practices in the wake of the election and continues to challenge the election results. Finally, there can be no argument that the survey responders opened themselves up to questioning about their union activities since they are not parties to the lawsuit,[16] and the Union cannot waive their confidentiality interests.[17]

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for the international union for some other purpose), *enforced*, 833 F.2d 426 (2d Cir. 1987).

[14] *See Allied Mechanical*, 349 NLRB at 1077 n.1; *Chino Valley Medical Center*, 362 NLRB No. 32, slip op. at 1 n.1.

[15] *See Guess*, 339 NLRB at 434-35.

[16] *Compare Guess*, 339 NLRB at 434-35 (deposition questions in workers' compensation case about attendance of non-party employees at union meetings violated Section 8(a)(1)), *with Maritz Communications Co.*, 274 NLRB 200, 201 (1985) (employer lawfully deposed plaintiff about his relationship with the union and the Board charge he filed where issues in civil suit and Board proceeding arose from similar operative facts and plaintiff's claims before the different tribunals may be inconsistent). *See also Stock Roofing Co.*, Case No. 18-CA-19622 et al., Advice Memorandum dated May 26, 2011, at 6-7 (deposition questions about plaintiff-employee's union and other protected activities lawful where he made his interest in union representation an issue by filing a Board charge and made his other complaints against the employer public by filing the discrimination and wage claim lawsuit in state court; in contrast, questions about other employees' union activities arguably violated the Act); *American Broadcasting Companies*, Case No. 31-CA-27698, Advice Memorandum dated May 24, 2006, at 7 (discovery requests for communications between named class-action plaintiffs and the union lawful where employer requests were narrowly tailored and employer did not attempt to ascertain the identity of non-named party employees).

In contrast, the Employer's need for the identities of the survey responders is marginal. The Union has already produced redacted versions of the surveys, with only the names concealed, so the Employer already has information concerning the particulars of the safety complaints. Moreover, the Employer's argument that it needs the employees' identities in order to verify the authenticity of the surveys, thereby testing the Union's defense that it was on the property to investigate employee reports of safety issues, is not compelling. In *National Telephone*, the Board determined that employee confidentiality interests trump an employer's need to obtain employee identities for cross-examination and credibility impeachment purposes, at least where the employer is not prejudiced by this limitation.[18] The Employer's objective here, to test the reliability of the surveys, is virtually indistinguishable from the employer's objective in *National Telephone*. Accordingly, employee confidentiality interests are paramount unless the Employer can demonstrate that it will be prejudiced. There can be no such claim here, since the Employer already possesses evidence demonstrating that the Union was aware of employee reports of safety issues prior to the trespass. About a dozen employees signed affidavits attesting to such concerns, and the Employer has copies of those affidavits and can scrutinize their authenticity. Unless and until the Employer demonstrates that the affidavits were fabricated, coerced, or otherwise unreliable, it need not probe the authenticity of the surveys. Accordingly, the Employer's insistence that the Union produce the safety surveys in unredacted form violates Section 8(a)(1) under the *Guess* balancing test.

Furthermore, we conclude that the protective order envisioned by the state court judge is insufficient to safeguard employees' confidentiality interests. The order will still permit an Employer representative, such as a human resources representative, to have access to the information, thereby creating an opportunity for intimidation. Such coercion is more than a speculative possibility in this case, given the Employer's history of unfair labor practices. Furthermore, even if the protective order limited access to the Employer's outside counsel handling the trespass dispute and outside labor counsel, this would not mitigate our concerns. The Board has held that questioning about confidential protected activities by outside counsel during the course of a legal proceeding likewise violates the Act.[19]

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[17] *National Telephone*, 319 NLRB at 422 ("The right to confidentiality exists for the protection of the employees, and thus cannot be waived by the [u]nion, but only by the employees themselves.").

[18] *Id.* at 421.

[19] *See Guess*, 339 NLRB at 435 n.8 (employees' confidentiality interests are not diminished by the fact that the employer's workers' compensation attorney posed the questions).

Furthermore, the Employer's counsel is planning to contact the surveyed employees to confirm that they completed surveys and to ascertain the circumstances under which they did so. This will exacerbate the situation by alerting employees to the fact that their confidentiality has been breached and by coercing them through interrogation.[20]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by seeking and insisting that the Union produce unredacted employee safety surveys in discovery.

/s/
B.J.K.

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[20] We likewise conclude that the Region's proposed solution—that the Union produce a list of survey responders such that the specific safety complaints raised in the surveys will remain anonymous—is insufficiently protective of employees' confidentiality interests. This approach gives the Employer an opportunity to intimidate employees, and will likely chill employees from completing such surveys in the future should they learn that their names were shared with the Employer. In addition, it still exposes information that employees have a substantial interest in keeping confidential, namely, that they communicated with the Union about safety concerns and were interested in becoming involved in the International's bus safety campaign.